IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 568

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,

Petitioner,

v.

RCA COMMUNICATIONS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER MACKAY RADIO AND TELEGRAPH COMPANY, INC.

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New York, April 28, 1953

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Respondent's combined brief in Nos. 567 and 568 is written under a set of misconceptions which distort the case out of all resemblance to what it was before the Federal Communications Commission. The simple question here is whether the Commission was warranted in authorizing a second direct radiotelegraph circuit between the United States and Portugal and The Netherlands in order to provide competition between radiotelegraph services. Respondent, however, has twisted the Commission's discussion and findings into an appearance totally adverse to its conclusion. Respondent has most inappropriately invoked Communications Act § 314 to perpetuate its own monopoly in radiotelegraph service to the points in question through insistence on maintaining the exact present proportion as between the amount of cable traffic and the amount of radio traffic in the AC&R system which the Commission

(entrusted with enforcement in the premises by 15 USC § 21) has found to be unnecessary.

1. Respondent's Erroneous Treatment of Federal Communications Commission Decision.

Respondent accuses the Commission of departing from the statutory standard of "public interest, convenience, or necessity" (Communications Act § 309[a]) and inventing and invoking a "substitute standard which it labels the 'reasonably feasible'" (br. p. 2). There is no justification for this statement. The finding of the Commission as to public interest, convenience and necessity appears at R 631. This follows a discussion of the statutory standards at R 628-30. The Commission properly says that these standards "include many elements which must be evaluated in the light of the particular facts of record in each instance" (R. 628).[1] In coming to its conclusion with respect to Portugal and The Netherlands the Commission determines that a second competing radiotelegraph circuit "is reasonably feasible" upon an evaluation of the various elements in each instance. Competition is only one to which "due weight" is accorded (R 628). Others are the demonstration by Mackay that it is technically, financially, and legally qualified to provide adequate service; that the cost to Mackay of the new circuits is minor; that a grant of the applications will not endanger the ability of RCAC and Western Union to continue competition; that the volume of traffic available to the points is sufficient to justify the additional radiotele-

[1] Contrast this declaration of the Commission with respondent's assertion that the Commission's action was "based solely upon the determination that still further competition in and of itself is the end to be achieved" (br. p. 33). See also R 627, discussed in our main brief at p. 11; and the Commission's unfavorable action on the Surinam application, R 680.

graph circuit in each case; and that the problem of frequencies is insignificant (R 628-30).

Actually, therefore, the Commission's consideration of what is reasonably feasible is shown by the context of its discussion to be a conscientious endeavor to weigh, measure, and apply the evidence to the statutory standard of public interest, convenience and necessity.

Likewise respondent's criticism (br. p. 47) of the Commission's action as resting upon speculative elements to an undue extent, is without justification. Even without a specific finding that Mackay's proposed service to the new points will immediately provide (a) lower rates, (b) speedier service, or (c) be more comprehensive than or (d) superior to the RCAC service, the Commission was certainly entitled to base its conclusion in part upon the benefits of competition in the industry (R. 623):

> "Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. Those seeking the patronage of customers are spurred on to install the latest developments in the art in order to improve their services or products, and in order to enable them to reduce expenses and thereby lower their rates or prices. The benefits to be derived from competition should, therefore, not be lightly discarded."

This is a finding based upon long experience in and familiarity with the communications field.

We have already pointed out the impossibility of a more specific finding as to immediate benefits (our main brief pp. 14-5). This Court recognizes that a regulatory commission must "speculate to some extent as to future consequences and effects" and that its judgment is based on "available facts as to present operations and business prac-

tices and past experience". *McLean Trucking Co.* v. *United States*, 321 US 67, 89 (1944). Specific benefits found by the Commission to flow from the new licenses involve improvement in Mackay's services as compared with the existing indirect circuits or manual relays (R 576, 596, 605-6; pp. 10-1, 14 of our main brief). These improvements in the Mackay service will enhance Mackay's ability to develop traffic (R 626).[2]

Respondent's summary of the Commission's alleged unfavorable findings (br. pp. 2-3), set in bold face type, contains so much omission and over-statement as to misrepresent the actual decision. For instance——

(a) Respondent's statement of the finding as to capacity of existing facilities is made misleading by omission of any reference to the Commission's full discussion of the *increase* of telegraph traffic since 1936 (R 570, 583-4, 619-20). This discussion culminates in the following most relevant consideration, which respondent's brief ignores (R 619):

> "From the foregoing, it is apparent that even if Mackay's applications herein are granted, and it is added as a fourth carrier to the three carriers now serving each of these points, *there still would be considerably more traffic available per carrier to each of such points than there was available in 1936 to the carriers then serving the points.*" (italics ours)

(b) Respondent's emphasis on existing competition, while correct so far as it goes, omits the crucial bearing of the trend found by the Commission to be in effect from cable traffic to radio traffic (R 620) and of RCAC's present advantage, by virtue of its monopoly position as respects

[2]The findings just referred to are completely ignored in respondent's brief.

radiotelegraph facilities, with regard to solicitation of business in The Netherlands (R 581) and Portugal (R 596). It was these factors that made the Commission attach such importance to installing radiotelegraph competition to The Netherlands and Portugal. *Yet these elements are nowhere discussed in respondent's extensive brief.*

(c) Respondent's statement of detriments to result from the new circuits (br. p. 3) is erroneous and quite out of proportion. Respondent is wrong in saying that the Commission "made findings that injuries to the public will result" (br. p. 15), and that it found "that no benefits, rather harm, to the public will result" (br. p. 34). The Commission's decision will be searched in vain for a finding about injuries or harm to the public. While it did find that the new circuits cannot reasonably be expected to generate new telegraph traffic in any substantial degree, the fact that they will result in a redistribution of existing traffic volumes (substantially increased since 1936) among the various carriers serving The Netherlands and Portugal has great significance, in the way of improved service and incentive to reduce rates. The Commission properly found it important to center the increased competition in the radiotelegraph field where traffic has conspicuously increased (R 620). Hence the Commission found that the new services would introduce "more effective competition between radiotelegraph carriers serving the points involved" (R 607), which means benefit and not injury to the public.

Again respondent argues (br. p. 16) that because of the contractual arrangements under which the new Mackay circuits will be operated there will be a diminution of revenue to the American communications industry. We point out however that the traffic handled by Mackay will be carried at

the same rates and pursuant to the same division of tolls as if this traffic were handled by respondent (R 622). For this reason any traffic which through an improved competitive position Mackay might divert from respondent can have no effect whatsoever upon the net revenue of the industry. In fact the present record indicates that the revenue of the industry as a whole will not be materially affected by Mackay's operations of direct circuits to The Netherlands and Portugal (R 572, 590-2, 607).

Respondent also creates the erroneous impression that the Commission in effect found that the new circuits would cause an "impact" on the rate structure as a whole and that this could "only mean an 'increase' in rates" (br. p. 17). Respondent fails to quote the actual finding of the Commission in this respect. This finding (R 607), which was not disturbed or questioned by the Court below, was

> ". . . that the added costs which might result on an industry-wide basis will be relatively small so that the impact on the rate structure as a whole should not be substantial."

The record shows that the estimated additional expense to be incurred by reason of the opening of Mackay's new direct circuits approximates $15,000 in the case of The Netherlands (only $6,000 in the event such operations are via Mackay's relay station in Tangier), and less than $6,000 for the proposed operation to Portugal. Furthermore, direct operation to both countries is to be conducted with equipment already available in normal reserve without the addition of plant (R 54, 56-8, 221-2, 231, 543). It is inconceivable that such low costs could possibly result in any increase in rates in the international telegraph industry

which has a gross investment in plant and equipment approximating $135,000,000.[3] RCAC itself in the years 1945, 1946 and 1947 installed equipment exceeding $6,000,000 in cost (R 415-7), and international carriers are constantly adding to plant investment (R 356).

The record is absolutely devoid of evidence which would support any argument that the new operations of Mackay will result in an increase in rates and a subsequent injury to the public. To the contrary between 1942 and 1946, while Mackay grew from 17 to 39 circuits, rates were reduced rather than increased in the international telegraph field (R 401-3, 415-6, 518). Respondent's statement about four recent rate increases in the United States international telegraph industry totalling over $13,000,000 on an annual basis (br. p. 48) somewhat misconceives the situation. These increases, authorized in 1947-9, followed general reductions in 1943-6 which aggregated $15,500,000 on an annual basis (*Charges for Communications Service,* Docket No. 8230, 12 FCC 29, 31 [1947]). Hence the antecedent *decreases* aggregated $2,500,000 more than the subsequent increases. These decreases were for the most part initiated by the carriers (p. 31). The subsequent increases, which alone seem to interest respondent, are described by the Commission as due to substantial increases in the cost of doing business, represented by wages, prices of materials and supplies, etc. (p. 31). On the other hand, the benefits of competitive factors in the industry are reflected in the measures for reducing cost and improving service which the Commission describes as follows (p. 31):

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[3]Report of Federal Communications Commission to Congress for fiscal year ended June 30, 1950, pp. 57-8.

> "Some of the carriers have also embarked upon modernization and improvement programs, designed to accomplish postwar rehabilitation of their facilities and to install more modern operating methods and facilities. These programs involve initial costs in substantial amounts and it appears that it may be some time before the efficiencies which may result from these programs will be substantially reflected in reduced operating costs. The carriers have undertaken economy measures to meet their rising costs, but such measures appear to have only a limited effect."

The fallacy of respondent's argument that foreign monopolies will "play off" one United States carrier against the other (br. pp. 17-8) is pointed out at pp. 58-9 in the brief submitted on behalf of the Federal Communications Commission.

Respondent's claimed concern about a "waste of radio frequencies" (br. pp. 18-9) is likewise without foundation. As stated by the Commission (R 575-6) "Mackay states that it is ready and able to operate its proposed circuits on its presently assigned frequencies". With respect to Mackay's proposed circuit via Tangier the Commission pointed out that the State Department had previously authorized the use by Mackay of certain frequencies at Tangier on a provisional basis but had temporarily withdrawn its authorization pending the Commission's decision in this case (R 576). With respect to the circuit to Portugal the Commission stated that Mackay did not believe it would need and was not requesting any additional frequencies (R 585). Recognizing that other frequencies might prove more desirable throughout the 11-year sun-spot cycle Mackay proposed to meet this problem by shifting its regu-

larly assigned frequencies between circuits, which practice is generally followed by radio carriers and is specifically permitted by the Commission's rules (R 216-7, 230-1, 237-40).

Finally respondent's fear about a "degradation of existing service" to follow from the new circuits (br. p. 19) is contrary to the Commission's statement that it cannot find an appreciable adverse effect on service (R 590). The word "degrade" represents RCAC's contention below which the Commission refused to adopt (R 588). The argument turned on the technical question of forked circuits, i.e. use of a single transmitter for communication to two carriers. This method is used extensively by radio carriers to conserve frequencies, transmitters, antennas and associated equipment, and to extend their usefulness. Respondent as well as Mackay uses forked circuits. Thus the record shows employment by respondent of circuits involving forks to several carriers with as many as three or four different points of reception in the United States (R 30-8, 367-8, 375-7, 586-7). The Commission's expressed satisfaction with Mackay's new service to be rendered on a similar basis (R 588-90) should, it would seem, leave no question for this Court.

(d) Respondent urges as a proposition of law that the statutory standard of public interest, convenience or necessity is not met unless the new operations authorized either fill an unsatisfied public need or result in immediate tangible benefits like improved service or lower rates (br. pp. 36-40). This point is covered by the authorities discussed at pp. 22-4 of our main brief. Moreover the Commission's reply brief in No. 567 at pp. 5-8 demonstrates that adequacy of existing service is not a barrier to the issuance of a certificate

under the Interstate Commerce Act, particularly when the prior operator has a monopoly as RCAC has in radio transmission to Portugal and The Netherlands. The findings as to an improvement in the Mackay service have been noted at p. 4 above.

The fact that the Commission has in the past exercised discretion in rejecting applications for new circuits, on the ground of the existing facilities (br. pp. 41-5), just as it did in the instant case with respect to Surinam, is but one more indication of the propriety of the conclusion reached with such mature consideration in respect of Portugal and The Netherlands.

2. Respondent's Misapplication of § 314.

Respondent's brief fails to inform the Court that (1) Mackay was created by the parent company of Commercial Cable in 1926 to compete with RCA in the international radiotelegraph field; (2) plans for the common ownership and operation of Commercial and Mackay as a co-ordinated cable and radio system were specifically approved by the Attorney General and by the Federal Radio Commission when it granted Mackay its first frequencies in 1928; and (3) Mackay's operations to The Netherlands and to Portugal are in no way different from or inconsistent with the program approved by the Attorney General and by the Federal Radio Commission. See these facts summarized in pars. 81-3 of the Commission's opinion in *Matter of The American Cable and Radio Corporation et al.*, Docket No. 9093, dated May 3, 1950, which decision has been filed with this Court by the Federal Communications Commission.

Section 314 of the Communications Act is directed to *acquisition* of radio communications facilities by a cable

company or cable communications facilities by a radio company if the purpose or the effect may be substantially to lessen competition, to restrain commerce, or to create a monopoly. The language also covers ownership or control of the two types of facility with the purpose or with the effect prohibited. Respondent's presentation of this section as a bar to granting of the applications was fully considered by the Commission (R 607-15), and the contention rejected. Upon a careful review of the facts, including the proportions of cable and radio business enjoyed by various competitors, the Commission held that, after the applications are granted (R 614),

> ". . . there will still be substantial competition between cable and radiotelegraph carriers for traffic to each of the three points and that the AC&R System would not have a monopoly of the traffic to any of these points";

and that a grant of the applications (R 615)

> "would not result in such substantial reduction of competition between cable and radio, or in the creation of a monopoly, so as to bring the AC&R system companies, and particularly Mackay, into violation of Section 314 of the Communications Act."

Pursuant to 15 USC § 21 (our main brief p. 47) Congress has expressly vested authority to enforce compliance with the antitrust laws "in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication . . .". The Commission's action under this grant of jurisdiction was taken not only in the instant case, but also upon a full record in the separate proceeding in Docket No. 9093 (see p. 10 above) stating

conclusions set forth at R 608-9 herein. Among them was the conclusion that the ownership, control and operation of cable and radio companies and facilities within the AC&R system does not violate § 314.

We fail to see how this thorough consideration and determination of the § 314 question leaves any problem for this Court or justifies the respondent in its desperate efforts to derive a lessening of competition out of the Commission's effort to increase competition. An original basic purpose of §314 was to permit radio as a new medium of communication to develop freely without interference from the older and better entrenched cable medium (R 610; par. 79 of decision in Docket No. 9093). Whereas in 1936 the cable carriers handled over 70% of the United States international telegraph traffic, the radio carriers in 1946 were handling 53.4% thereof (R 620); and the purpose of the Commission's action in the instant case was to equip Mackay for more effective competition in the new field. What respondent is doing, in reality, is to argue for strict maintenance of Commercial Cable Company's ineffective, indirect cable competition in order to defeat Mackay's effective direct radio competition.

Section 314 does not prohibit *any and all* common ownership of radio and cable facilities. Such common ownership exists in the AC&R System. The statute prohibits only the employment thereof to lessen competition in a substantial degree or to create a monopoly. The only monopoly here presented is that of respondent in the radiotelegraph field, as regards the points in controversy and other communications centers (our main brief pp. 12-3, 18). Any claim of lessening of competition by reason of the proposed new circuits is refuted by the figures showing that in 1947

the AC&R companies handled 12.3% and 22.8% of the outbound traffic to Portugal and The Netherlands respectively while Western Union and RCAC handled 87% and 77% (R 612).

Nevertheless respondent strenuously argues the iniquity of "diverting" traffic inside the AC&R System from Commercial Cable to Mackay Radio (br. pp. 34-5, 53-8). What this argument overlooks is that, to invade RCAC's monopoly by becoming an effective radio competitor, the AC&R system must turn into radio traffic what would inevitably be cable traffic if it had no radio facilities. In other words, the very nature of the trend to radio communication noted by the Commission (R 620) is that customers in the exercise of free choice prefer radio communication. If equipped and licensed to furnish it, Mackay will participate in this trend by competing with RCAC. To the extent that effective competition results, cable messages will be diminished, since the same customer will not send the same communication in both media.

But to argue that Mackay will suppress customer preference and use cable business as "leverage" (br. p. 63), is entirely unjustified, since Mackay must respect customers' preferences with respect to routed traffic. Unrouted traffic, on the other hand, cannot be termed either cable or radio traffic and hence cannot properly be spoken of in terms of "diversion". The estimated 25% of "diversion" in the case of Portugal and 50% in the case of The Netherlands cited by respondent (br. p. 56) from the Commission's findings (R 613-4) have no significance when it is realized that the traffic is unrouted traffic and that the "diversion" is made possible only by the addition of radio facilities to points where the AC&R System formerly had none. The so-called "diversion" is meaningless in the picture of total competition

afforded by the findings at R 615, where it appears that in 1947 the AC&R companies handled a smaller share and RCAC a considerably greater share of total traffic as compared with 1936, notwithstanding the grant to Mackay of numerous duplicating circuits in the interval.

These facts reduce to absurdity respondent's attempts to compare the percentage of cable traffic to The Netherlands and Portugal susceptible of conversion into radio traffic with the percentages involved in clear statutory violations (br. pp. 55-6), like the *Standard Oil of California* case, 337 US 293 (1949) and the *International Salt* case 332 US 392 (1947).

Since the statute here invoked by respondent is § 314 dealing with common ownership of cable and radio facilities, it is quite beside the point to stretch and extend to this separate field Sherman Act decisions, such as *Timken Roller Bearing Co.* v. *United States* 341 US 593 (1951), *Lorain Journal Co.* v. *United States* 342 US 143 (1951), and *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.* 340 US 211 (1951). It is startling to find the language of this Court characterizing findings of trial judges after the litigation of distinct issues of fact in those distinct situations under the Sherman Act, lifted out of context and given such purely argumentative application contrary to the findings of the Commission. For the Commission has *not* found as a fact the prospective lessening of competition between radio and cable which respondent professes to fear. The Commission *has* found that granting of the licenses in question would enhance competition between radio and radio and that increased competition in this area of increasing importance best serves the public interest, convenience and necessity.

By this enhancement of radio carrier competition the Commission will attain the maximum fluidity of international communications service for public use. Mackay will be admitted by direct circuit to Amsterdam and to Lisbon, where now RCAC has a monopoly. The existing incentive to the public administrations in those countries to give all their United States traffic to RCAC (R 606, 620) will be diminished to the end of creating radio carrier competition. To compare the role of Commercial Cable Company in this situation with the use of the buying power of a motion picture circuit to obtain exclusive privileges from film distributors (*United States* v. *Griffith*, 334 US 100 [1948]) or a publisher's attempt to force advertisers to boycott a competing radio station (*Lorain Journal Co.* v. *United States*, 342 US 143, 152 [1951])—in our submission completely misses the point of the Commission's action here. This is not "the operation of a cable line to restrain competition between radio carriers" (br. p. 62).

For respondent to seek to escape the consequences of competition in areas of radio communication which it has heretofore monopolized, by representing Mackay's means of competitive effort as "a classic conspiracy in restraint of trade" (br. p. 63), is a paradox indeed.

CONCLUSION

The decision of the Federal Communications Commission represented the right solution of a complicated factual problem, in the direction of liberating competitive forces for action in the field increasingly preferred by the public users of international communications, viz. the radiotelegraph field. That agency, to which Congress has pecu-

liarly committed enforcement of the safeguards of Communications Act § 314, has fully justified the new licenses by findings left untouched by the Court of Appeals. The Commission's action should be reinstated, and the order of the Court of Appeals reversed.

Respectfully submitted,

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